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# Judicial Review of Administrative Action in Florida -- Quo Warranto

issory notes or bonds. If this should be done the amounts of the promissory notes or bonds might be treated as amounts invested in the capital stock of the corporation[3].

Therefore, in closely held corporations, we should not ordinarily use preferred stock, and we should not use an excessive amount of promissory notes or bonds.

3 See *Swoby Corp. v. Commissioner,* 9 TC No. 118 (1947); 1432 Broadway Corp., 4 TC 1158 (1945), aff'd, 160 Fed. 2d 885 (C.C.A. 2d, 1947); and *John Kelley v. Commissioner* and *Talbot Mills v. Commissioner,* 326 U. S. 521 (1946).

## JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN FLORIDA—QUO WARRANTO

Among the extraordinary common law writs by which the courts have been enabled to review action of the administrative branch of the government is the writ of quo warranto. In many jurisdictions, this writ is the complement of mandamus, being used to prevent administrative action which is arbitrary or in excess of power; in others the writ is narrow in scope, being used only to test title to office or right to franchise. Florida appears to be of the latter class. Since prohibition lies only to prevent judicial or quasi-judicial action, recourse must be had to equity where it is necessary to prevent arbitrary ministerial action in excess of powers unless title to office can be challenged.

In previous issues, it has been pointed out that administrative law has been developed in the procedure by which courts review, correct, or prevent action of the executive branch of government.

Quo warranto is an ancient common law writ. Statutory elaborations and modifications since the reign of Edward I have altered the remedy, yet the basic purpose has remained the same. Blackstone defines quo warranto as "a high prerogative writ in the nature of a writ of right for the king against him who obtained or usurped any office, francise, or liberty of the Crown, which also lay in case of non-user or long neglect of a franchise, or mis-user or abuse of it."[1] The writ later became an information in the nature of quo warranto which was criminal in nature designed not only to oust the usurper, but to punish him by fine for such usurpation. The sands of time have since shifted and effectively obliterated this viewpoint, and an early Florida opinion is found which sets forth the modern concept. "The proceeding by information in the nature of quo warranto is essentially a civil proceeding, and the pleadings in it are as much subject to amendment as they are in ordinary civil actions. It is criminal only in form."[2]

1 Blackstone 3 Com. 262, 4th Am. Ed. 322.

2 *State v. Gleason,* 12 Fla. 190 (1869).

Actually the writ has always been the property of the public. Thus, quo warranto cannot be sought to determine a private right in which the public is not interested. So any information in the nature of a quo warranto, like the writ of mandamus, never lies to enforce the performance of private contracts.[3]

Although the Florida Supreme Court has said that quo warranto is a writ of right which sovereign power demands through the medium of its chief law officer, and requires respondent to show cause why he or it should not be shorn of certain powers,[4] later decisions by this same court have declared the writ to be a discretionary writ and remedy.[5] The fact that the state was seeking the writ did not, in the former case, make a discretionary writ one of right.

The State of Florida has, in addition to the aforementioned common law writ of quo warranto, statutory proceeding authorized by Secs. 80.01 to 80.04 1941 F. S. A. Both the Circuit Courts and the Supreme Court have the power to issue writs of quo warranto according to Art. 5, Secs. 5 and 11 of the Florida constitution. Proceedings by quo warranto, like those by certiorari, mandamus, habeas corpus, and prohibition, are orginal in their nature, though they may be invoked to perform functions that are appellate in character.[6] This statutory remedy is available to a person claiming title to an office, which is exercised by another, upon refusal by the attorney general to institute proceedings in the name of the state. The claimant is thus able to file an information or institute an action against the person exercising the office, setting up his own claim. Under the terms of the statute, the court is authorized and required to determine the right of the claimant to the office if he so desires.

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3 State ex rel *Moodie v. Bryan,* 50 Fla. 293, 39 So. 929 (1905). Trustees of Florida Agricultural College made a contract with one W. H. Gleason to locate college permanently in a certain place. Legislature later replaced the trustees and the new ones were authorized to relocate the plant. Court said that quo warranto was not the proper instrument for enforcing private contracts.

4 State ex rel *Landis v. S. H. Kress & Co.,* 115 Fla. 189, 155 So. 823 (1934). Suit to oust foreign corporation from its permit to do business in Florida alleging that corporation by combination with associated corporations has "created and carried out restrictions on the full and free pursuit of businesses authorized by the laws of the State of Florida".

5 *City of Winter Haven v. State ex rel Landis* 125 Fla. 392, 170 So. 100 (1936). Suit by attorney general to cut the size of Winter Haven from four and one-half square miles to one square mile because of irregularity of organization twelve years before. Held for the city, writ is one for sound judicial discretion; it is the duty of the court to consider all the conditions and consequences. *State ex rel Hawthorne v. Wisehart* 28 So. 2d 589 (Fla. 1946).

6 *State ex rel Associated Utilities Corporation v. Chillingworth* 132 Fla. 587, 181 So. 346 (1938).

The gist of the common law action differs from the proceedings brought under the aforementioned statutes.[7] Of the former, an opinion has been delivered which stated that it is not necessary that there be a relator or one contesting, as the gravamen is whether the respondent is properly occupying the office and not whether someone else is entitled to it.[8] The court then proceeded to say that respondent's answer must set forth with particularity all facts necessary to show good title.[9] This places the burden on the respondent to show that he is the rightful occupant of the office in question.[10]

As has been enunciated above, the two types of proceedings gain the same result albeit the procedure has changed via the legislatures. Under the statutes the burden is on the petitioner, and he can succeed only on the strength of his claim and not on the weakness of that of the respondent.[11]

The line of demarcation between quo warranto and mandamus has at times eluded strict definition. In dealing with this difficulty the Florida Supreme Court has said that when an office is filled by an incumbent who is exercising the functions of such office de facto and under color of right, mandamus will not lie to compel the admission of another claimant. In all such cases the party aggrieved, who seeks adjudication upon his alleged title and right to possession, will be left to assert his right by the aid of an information in the nature of a quo warranto, which is the only efficacious and specific remedy to determine the questions in dispute.[12]

In attempting to define the scope of the writ under consideration in the sense of determining when and under what circumstances quo warranto proceedings are proper, it is essential to examine the decisions which have issued in this jurisdiction. One case has delimited the scope

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7 Secs. 80.01 to 80.04, 1941 F. S. A.

8 *State v. Gleason, supra.* Note 2.

Suit to oust W. H. Gleason from office of Lieutenant Governor on grounds that he was unqualified at time of his election in that he was not at the time a citizen of Florida for three years.

9 *State v. Gleason, supra.* Note 2.

10 *State v. Saxon,* 25 Fla. 342, 5 So. 801 (1889). Respondent charged with usurping the office of Clerk of the Circuit Court demurred and was overruled. Court said that non usurpavit not a proper plea; that full and complete requisites must be shown to have been complied with.

11 *State ex rel Clark v. Klingensmith,* 126 Fla. 124, 170 So. 616 (1936). Relator claimed that he was entitled to office held by respondent and alleged that nineteen illegal ballots were counted for respondent and three legally cast for relator not counted.

12 *City of Sanford v. State,* 73 Fla. 69, 75 So. 619 (1917). Defendant-in-error brought mandamus against the mayor and city council of the City of Sanford alleging that he was lawful treasurer and assessor of said city and that the mayor had unlawfully appointed another to said office. Held that mandamus was improper.

by stating that quo warranto will not lie except to test the right of a person to hold an office or franchise or exercise some right or privilege the peculiar powers of which are derived from the state.[13] Such office must be of a public nature to justify employment of quo warranto to try title to same.[14]

Mere function of office, as distinguished from the office itself, may not be the subject of quo warranto.[15] Such proceedings against the officer do not constitute a proper remedy to test the legality of his past or future conduct, where it does not ipso facto operate as, or form grounds for, forfeiture of office; and neither title to office nor right to franchise is involved.[16]

Corporations, being creatures of the state, are not infrequently involved in quo warranto proceedings. Ordinarily, information in the nature of a quo warranto may be used to determine the right to exercise of corporate office or franchise.[17] Such has been held to be proper to resolve the validity of an election of corporate officers.[18] Thus, it appears that the instrumentality of quo warranto is at the beck and call of a properly interested victim of corporate inequity of this type. Its existence serves to stay violations of rights and powers arising from public franchise.

The concept that quo warranto is chiefly concerned with maintaining, as its underlying premise, the interest of the public may act to deny issuance of the writ. Where such relief will result in confu-

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13 *State ex rel Merrill v. Gerow,* 79 Fla. 804, 85 So. 144 (1920). Relator brought action to oust respondent from the office of Chairman of the Republican State Executive Committe of Florida. The writ was denied.

14 *State ex rel City of St. Petersburg v. Noel,* 114 Fla. 175, 154 So. 214 (1934). City challenged right of respondent to occupy the office of Chief of Police of the city. Respondent questioned the authority of the court to issue the writ. Application was granted.

15 *State ex rel Landis v. Valz,* 117 Fla. 311, 157 So. 651 (1934). Quo warranto to prevent city commissioners from issuing a permit to build a dog-racing plant in restricted district under provision of zoning ordinance giving commissioners power to vary provisions of zoning ordinance in specific cases to prevent hardship held not to lie where issuance of the permit was only speculative.

16 *State ex rel Landis v. Valz, supra.* Note 15.

17 *Gentry-Futch Company v. Gentry,* 90 Fla. 595, 106 So. 473 (1925). Injunction sought in equity to oust respondent from exercising office of president of a corporation. Held that quo warranto was proper unless jurisdiction of the cause was in equity on other grounds and determination of title to office incidental. Equity has no inherent jurisdiction where mere right to office is involved.

18 *Davidson v. State,* 20 Fla. 784 (1884). Respondent contended that position of president of Stevedore's Benevolent Association not such an office or franchise as can be inquired into by information in the nature of a quo warranto. Held against this contention.

sion and disorder and will produce injury to the public which outweighs individual right of complainant to have relief, quo warranto will not be granted even though it clearly appears that complainant may be ordinarily entitled to relief.[19]

The public interest requires that one properly entitled should discharge the duties of a public office. In pursuance of this policy, a public officer with imperfections in his title should be ousted. Time, however, can heal and make perfect his title by removal of his disqualifications. Thus mollified, public interest wanes and an adjudication of the rights of the litigants inter se would serve no useful purpose. A recent case well illustrates this principle. There is was said that quo warranto would not be granted to challenge the office of a judge of the Circuit Court because the judge had been appointed in violation of the constitutional provision that no legislator shall during his term be appointed or elected to any civil office that has been created or the emoluments thereto increased during his term as member of the Legislature[20] which had increased Circuit Judges' salaries, where judge's term as legislator had expired at time when quo warranto proceedings were brought.[21]

The writ of quo warranto along with other extraordinary legal remedies occupies an important position in our governmental scheme by its remedial effect on errors of the executive and legislative departments; it is another of the many checks and balances. Although the writ had its origin in antiquity, it has a quality of flexibility which lends itself to progress. As has been said herein the writ is discretionary, thereby enabling the courts to fit the remedy to the social and economic conditions extant where circumstances compel a step forward.

19 *State ex rel Pooser v. Wester,* 126 Fla. 49, 170 So. 736 (1936). Pooser et al filed an information in the nature of a quo warranto seeking to invalidate a primary election but waited until less than a month before the November election. Held that confusion and disorder would result in injury to the public which outweighed the individual right of the individual.

20 Art. III, Sec. 5, Fla. Const.

21 *State ex rel Hawthorne v. Wisehart, supra.* Note 5.

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## JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN FLORIDA—MANDAMUS

In a previous issue of this publication,[1] a discussion was begun of the extraordinary common law writs and their use in Florida as a means of asserting judicial control over administrative processes. There

1 *See "Certiorari to Administrative Tribunals in Florida"* Vol. 2 Miami Law Quarterly 181.